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MATERIALS ON PROPERTY

PART II

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P R O P E R T Y - P A R T II

CONTENTS

CHAPTER I

THE ANGLO-CANADIAN SYSTEM OF LAND TENURE

Section 1 HISTORICAL BACKGROUND

Cheshire, Modern Real Property	1.1.1
Extract from Simpson, Introduction to History of Land Law	1.1.9

Section 2 LAND LAW AND TENURE IN CANADA

Laskin, Cases and Notes on Land Law	1.2.1
The Escheats Act	1.2.3
Matter of People (Melrose Ave.)	1.2.5
Re Androws	1.2.8
Note	1.2.12
Problem	1.2.13

CHAPTER II

POSSESSORY ESTATES AND THE CONCEPT OF SEISIN

Section 1 The Doctrine of Estates

Note	2.1.1
Re Shields (Trustee of Estate of Harris Construction Co. Ltd.) and City of Winnipeg	2.1.4

Section 2 Seisin and Possession

Bigelow, Introduction to the Law of Real Property	2.2.1

Section 3 Seisin and Conveyancing

Bigelow, Introduction to the Law of Real Property	2.3.1
Conveyancing and Law of Property Act	2.3.2

Section 4 Common Law Consequences

Laskin, Cases and Notes on Land Law	2.4.1
Questions	2.4.2

Section 5 Subject Matter of Estate Ownership

Kelsen v. Imperial Tobacco Co. (Of Great Britain & Ireland) Ltd.	2.5 1
Atlantic Aviation Ltd. v. Nova Scotia Light & Power Co. Ltd.	2.5.7
Edwards et al v. Sims	2.5.13
The Public Lands Act	2.5.16
B. W. Powers & Son Ltd. v. Town of Trenton	2.5.17
Re Bulman	2.5.19
Mascioli v. Betteride-Smith Construction Co.	2.5.23

Section 6 Fixtures

Note	2.6.1
Stack v. T. Eaton Co.	2.6.2
Strain v. Green	2.6.3
Jones v. Lucas	2.6.7
Ellis v. Glover & Hobson, Ltd.	2.6.10
The Conditional Sales Act	2.6.14
The Personal Property Security Act	2.6.15
Hoppe v. Manners	2.6.16
Greater Winnipeg Gas Co. v. Petersen	2.6.19
La Salle Recreations Ltd. v. Canadian Camdex Investments Ltd.	2.6.25
The Registry Act	2.6.29

CHAPTER III

ADVERSE POSSESSION

Section 1 Introduction

Ballantine, Title by Adverse Possession	3.1.1
Ewing v. Burnet	3.1.2
The Limitations Act	3.1.5

Section 2 Operation of the Statute

Brown v. Phillips et al	3.2.1
Meredith v. Attorney-General of Nova Scotia et al	3.2.5
The Quieting Titles Act	3.2.7
Note	3.2.8
Note	3.2.11

Section 3 Running of the Limitation Period

Note	3.3.1
Agency Company Limited and Templeton v. Short	3.3.6
Hughes v. Griffin	3.3.9
Williams Brothers Direct Supply Ltd. v. Raftery	3.3.15
Walker, et al. v. Russell, et al.	3.3.20
Bligh v. Martin	3.3.31

Section 4 Disabilities

Note	3.4.1
The Limitations Act	3.4.4

Section 5 Tacking

Ballantine, Title by Adverse Possession	3.5.1
Asher and Wife v. Whitlock	3.5.5
Perry v. Clissold and Others	3.5.7
Beaudoin v. Brown and Eadie	3.5.9
Fleet and Fleet v. Silverstein and Tenebaum	3.5.12
Note	3.5.14

Section 6 Non-Applicability to Land Under the Land Titles Act

Montreal Trust Co. v. Murphy	3.6.1
The Land Titles Act	3.6.2

CHAPTER IV

IMPROVEMENTS MADE ON ANOTHER'S LAND

Inwards v. Baker	4.1.1
Brand v. Chris Building Pty. Ltd.	4.1.4
Gay v. Wierzbicki	4.1.7
Note	4.1.11
Tonks et al v. Township of York and Reid et al	4.1.12

CHAPTER V

PROBLEMS FOR REVIEW

Problems for Review	5.1.1

CHAPTER VI

THE ESTATE IN FEE SIMPLE

Section 1 Characteristics

Casner and Leach, Cases and Text on Property	6.1.1
Problem	6.1.1
Megarry and Wade, The Law of Real Property	6.1.4
Conveyancing and Law of Property Act	6.1.5
The Wills Act	6.1.5
Problem	6.1.6

Section 2 Alienability of an Estate in Fee Simple

Laskin, Cases and Notes on Land Law	6.2.1
Devolution of Estates Act	6.2.3
D'Arundel's Case	6.2.5
Re Brand	6.2.6
Re Stevenson	6.2.7
Report of the Ontario Law Reform Commission on the Proposed Adoption in Ontario of the Uniform Wills Act, 1968	6.2.10

CHAPTER VII

DEFEASIBLE ESTATES IN FEE SIMPLE

Section 1 General Nature

Determinable Fee Simple	7.1.1
Megarry and Wade, The Law of Real Property	7.1.2
Hopper v. Corporation of Liverpool	7.1.3
Re Tilbury West Public School Board and Hastie	7.1.6
Re North Gower Township Public School Board and Todd	7.1.10

Section 2 Void Conditions

Megarry and Wade, The Law of Real Property	7.2.1
Re Collier	7.2.3
Re Down	7.2.7
Re Messinger	7.2.12
Re Goodwin	7.2.14
Re McColgan	7.2.17

CHAPTER VIII

THE ESTATE IN FEE TAIL

Section 1 Characteristics

Note	8.1.1
Re Carr and Smith	8.1.3

Section 2 Construction

Megarry and Wade, The Law of Real Property	8.2.1
Re Haig	8.2.3
The Wills Act	8.2.5

Section 3 Abolition of Fee Tail

Laskin, Cases and Notes on Land Law	8.3.1

Section 4 Problems

Problems	8.4.1

CHAPTER IX

THE LIFE ESTATE

Section 1 Creation by Conveyance

Littleton's Tenures	9.1.1
Coke Upon Littleton	9.1.1
Littleton's Tenures	9.1.2
Laskin, Cases and Notes on Land Law	9.1.2
In Re Amos, Carrier v. Price	9.1.3
Humans v. Doyon	9.1.5
Lapointe v. Cyr	9.1.8
Unrau v. Barrowman et al	9.1.11

Section 2 Created by Operation of Law

Casner and Leach, Cases and Text on Property	9.2.1
The Married Women's Property Act	9.2.2
The Conveyancing and Law of Property Act	9.2.2
The Devolution of Estates Act	9.2.2
Question	9.2.2
Casner and Leach, Cases and Text on Property	9.2.3
The Dower Act	9.2.4
Freedman v. Mason	9.2.6
Freedman v. Mason	9.2.9
Freedman v. Mason	9.2 13
Stern v. Sheps et al	9.2.16
Registry Act	9.2.19

Section 3 Dower and Mortgages

Re Lesperance	9.3.1
The Dower Act	9.3.4
Re Smith	9.3.5

Section 4 Election between Dower and Other Benefits

MacWilliams v. MacWilliams and Ray et al	9.4.1
The Devolution of Estates Act	9.4.6
Re Grant, Abbott v. Grant	9.4.7
Re Greisman	9.4.10

Section 5 Deed to Uses and Dower

Re Hazell	9.5.1
Re Morley and Kent	9.5.7
The Registry Act	9.5.9
The Land Titles Act	9.5.10

Section 6 Dower and The Registry Act

Whyte v. Davey	9.6.1
Re Tierney	9.6.3

Section 7 Alienation of a Life Estate

Camston Ltd. v. Volkswagen Yonge Ltd.	9.7.1
The Settled Estates Act	9.7.3
Re Fell	9.7.5
Hunter v. Doan	9.7.8

Section 8 The Matrimonial Home

Re Smyth and Smyth	9.8.1
Stevens v. Brown	9.8.6

Section 9 Problems for Review

Problems for Review	9.9.1

APPENDIX

Re Metro Videon Ltd. and Rural Municipality of Fort Garry; Re Greater Winnipeg Cablevision Ltd. and Rural Municipality of Fort Garry	2.1.11
The Aliens' Real Property Act	2.1.15

NOTE: In Ontario, in most situations where an escheat may have occurred, as a matter of convenience the Public Trustee will elect to make application to the court for an order granting him administration of the deceased's estate under The Crown Administration of Estates Act, R.S.O. 1960, c. 80. That Act enables the Public Trustee where there are no known relatives to take steps to protect the property of the deceased for the benefit of those who may be entitled to it (R. v. Bonnar (1898), 24 O.A.R. 220). It also enables the Public Trustee, without obtaining letters of administration from the court, to take possession of any real estate in Ontario, where a person dies intestate and without any known heirs in possession of such real estate or entitled to it.

By section 5 of the Act, the Lieutenant Governor in Council may authorize the Public Trustee to sell any land in Ontario or an interest therein, once administration of the deceased's estate has been granted to him. All money realized from estates to which the Public Trustee is administrator is kept in a bank or invested, as the Lieutenant Governor in Council directs. All money that is unclaimed for ten years after the death of the deceased is paid into the Ontario Consolidated Revenue Fund. The Act does provide that any person proving title to such money is entitled to receive it with interest at such rate as the Lieutenant Governor in Council directs.

Finally, the Act provides that after giving certain notice prior to the expiry of ten years, the Public Trustee may pay any unclaimed money or assign any personal property remaining in his hands, in accordance with any direction of the Lieutenant Governor in Council made under the Escheats Act.

In actual fact, it is rare for money or property administered under the Act not to be claimed. It has been estimated that of one hundred estates administered under the Act, the assets of only fifteen are paid into the Consolidated Revenue Fund, having been unclaimed for ten years. In about five of these cases, money paid into the Fund will later be paid out of it to persons proving title to it. The Public Trustee obtains orders under the Act granting him administration of about six hundred estates annually.

NOTE:

It is clear that, as a matter of common law, if A and B squat on land, they can acquire an interest as joint tenants as there will be, inter alia, unity of title. Co. Litt. 278; Bl. Comm. ii, 181. However, sec. 14 of the Conveyancing and Law of Property Act, R.S.O., 1960, c. 66, provides:

> 14. Where two or more persons acquire land by length of possession, they shall be considered to hold as tenants in common and not as joint tenants.

At common law, unless there had been an actual expulsion, possession of one co-owner was regarded as possession of the other or others. Fairclaim v, Shackleton, 2 Black W. 690. Thus, if A and B were co-owners of land the possession of A was, at common law, regarded also as the possession of B. This could work unfairly in two respects. Firstly, in its application to strangers: if A was in actual possession and B was out of possession, a stranger, X, could not acquire a title against B no matter how long he squatted on the land. Secondly, between the co-owners inter se: if for any length of time B was out of possession, and A in actual possession, B's title would not be extinguished.

Sec. 14 of the Statue of Limitations, R.S.N.S. 1967, referred to in Meredith v. Attorney-General of Nova Scotia is substantially similar to sec. 12 of the Imperial Real Property Limitation Act, 1833. So too is sec. 11 of the Limitations Act of Ontario. In Paradise Beach & Transportation Co. Ltd. v. Price Robinson [1968] 2 W.L.R. 873, Lord Upjohn delivering the opinion of the Privy Council said:

.....

> Onto the Statute of James the common law engrafted the doctrine of "non adverse" possession, that is to say, that the title of the true owner was not endangered until there was a possession clearly inconsistent with its due recognition, namely, "adverse possession"; so that there had to be something in the nature of ouster. But in practice it was very difficult to discover what was sufficient to constitute adverse possession; thus the possession of one co-tenant was the possession of the rest though undisputed sole possession for a very long time might be evidence from which a jury could properly presume ouster. *Doe d. Fishar & Taylor* v. *Prosser.*[1] All this was swept away by the Act of 1833 as was explained in an illuminating judgment of Denman C.J. in *Culley* v. *Doe d. Taylerson.*[2] After pointing out that at common law the possession of one tenant in common was possession of all and that there must be an ouster he continued
>
> > "The effect of this section [No. 2] is to put an end to all questions and discussions, whether the possession of lands, &c., be adverse or not; and, if one party has been in the actual possession for twenty years, whether adversely or not, the claimant, whose original right of entry accrued above twenty years before bringing the ejectment, is barred by this section."
>
> He then went on to point out that this section standing alone would not have affected the possession of co-tenants for at common law the possession of one was possession of the other and the position would have remained to be determined by the rules of the common law.
>
> He then quoted section 12 and held that the effect of the section was to make the possession of co-tenants separate possessions from the time when they first became tenants in common and that time ran for the purposes of section 2 from that time.

In the earlier case of *Nepean* v. *Doe d. Knight* [3] Denman C.J. had said:

> "We are all clearly of opinion that the second and third sections of that Act . . . have done away with the doctrine of non-adverse possession, and . . . the question is whether twenty years have elapsed *since the right accrued*, whatever be the nature of the possession."

And then the learned editor of Darby and Bosanquet on Limitation of Actions, 2nd edition, p. 377, when discussing this case adds "so that without an actual ouster the one tenant in common could bring his ejectment and the other could defend his possession under the statute." All this is well settled law and there are a number of authorities to the like effect, see for example *Ex p. Hasell* [4]; *Doe d. Jones* v. *Williams.*[5]

Counsel for the appellant, however, has argued that though this may represent the law where a third party (an intruder) is in possession that does not apply where no one is in wrongful possession. He points out truly that Roseliza and Victoria were rightfully in possession of the whole land and were committing no wrong by farming all of it, see *Henderson* v. *Eason* [6]; *Jacobs* v. *Seward.*[7]

So he submits that time has not yet started to run because the petitioners could not sue them as no wrong has been committed by those in possession; put in another way it was argued that time cannot run in favour of the co-tenants in possession until they commit a wrong.

Furthermore it was argued that while a right to enter arose in 1913 that was not a right to "make an entry" for the purposes of section 1 of the Act of 1874 for such a right did not arise until an intruder was in possession or until there was some wrongful act by the co-tenants in possession.

These arguments necessarily led to the submission that where a co-tenant was lawfully in possession of the whole there must be some wrongful act showing a possession inconsistent with the co-tenants' right to re-enter; something which counsel could not attempt to define but which was short of adverse possession under the pre-1833 law.

Their Lordships have no hesitation in rejecting this argument; to adopt it would defeat the whole object of the Act of 1833. It seems to their Lordships clear from the language of the Act and the authorities already referred to that subject to the qualification mentioned below where the right of entry has accrued more than 20 years before action brought the co-tenants are barred and their title is extinguished whatever the nature of the co-tenants' possession. That right of entry (ignoring immaterial facts as to the widow and Nehemiah) accrued in 1913.

Counsel for the respondents was inclined to agree with the view that in contrast to the right of entry the time for bringing an action or suit had not yet started to run. Their Lordships cannot agree; it seems to them clear that for the purposes of section 1 of the Act of 1874 the right to make an entry and the right to bring an action both accrued at the same time in 1913.

The qualification mentioned above rises upon section 12 of the Act of 1833. The "separate possessions" (to adopt the phrase of Denman C.J.) obviously only start when the occupation is "for his or their own benefit." That is the crucial question as Lord Greene M.R. pointed out in *In re Landi.*[8] That is primarily a question of fact though the law may sometimes imply that one co-tenant is in possession for another co-tenant, e.g., a father for his infant but not adult son, see *In re Hobbs* [9]; otherwise it is a question of proving some agency or trusteeship or acknowledgment of title on the part of those in possession. These matters were canvassed by counsel for the second appellants but there were no facts upon which he could base any useful argument.

The learned judge reviewed the facts fully and reached the conclusion that the possession of both Roseliza and Victoria was for their own use and benefit and their Lordships agree with that conclusion.

There was some argument before their Lordships as to whether the commencement of the time for making an entry or bringing an action was to be determined by reference to section 1 of the Act of 1874 or section 3 of the Act of 1833. It is, however, clearly settled and was not in dispute before their Lordships that section 3 does not limit the generality of section 1 but is only explanatory of that section and to settle cases where under section 1 there might be a doubt when time started to run, see *James* v. *Salter* [10]; *Governors of Magdalen Hospital* v. *Knotts* [11]; *Pugh* v. *Heath.* [12] In *James* v. *Salter* [13] it was assumed that a devisee could not take under any branch of section 3 and that section 1 of the Act of 1874 applied. The opinions of text writers including (Lord St. Leonards) have doubted the correctness of this assumption, see Darby and Bosanquet, pp. 306–8, but as whichever section is applicable, time started to run more than 20 years before action brought their Lordships do not think it necessary to express any opinion upon this question.

As the learned judge held it is clear that the petitioners' claim is barred by the Acts of 1833 and 1874 and their title is thereby extinguished by section 34 of the Act of 1833.

Their Lordships would like to express their thanks to Scarr J. for his most admirable judgment, full and lucid in relation to the facts and clear and accurate as to the law.

Their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellants must pay the respondents' costs of the appeal.

NOTE: The House of Lords in Fairweather v. St. Marylebone Property Co. Ltd., [1963] A.C. 510, [1962] 2 W.L.R. 1020, [1962] 2 All E.R. 288; reviewed the position of a squatter who gains title by adverse possession. However, the focus of the decision was reserved for the status of a squatter who dispossesses a lesseee, and a consideration of what interest and protection is acquired by the squatter as against the lessee and also as against the lessor.

> Two adjacent lots number 311, and 315 West End Lane, originally held by one freeholder were in 1894 leased separately under 99 year leases. The freeholder before dividing and leasing the plots had built a shed which was 3/4 on lot 315 and 1/4 [including the entrance] on lot 311. In 1920 the tenant of lot 311 went into possession of the whole shed and so occupied it till 1951. In 1951 he sub-leased it to P for 21 years and P assigned the sub-lease to the present defendant. In 1959 the plaintiff purchased the freehold to number 315 subject to the unexpired term of the 99 year lease Shortly thereafter, however, the plaintiff obtained a surrender of the leasehold estate in number 315, from the then lessee. The plaintiff then claimed possession of that part of the shed which stood on lot number 315, while the defendant claimed he was entitled to possession of the whole shed until the end of the leasehold term.

It was held that the squatter by his possession and by the indirect operation of the Limitation Act gained a legal possessory title ["defeasible fee simple"- see [1962] 1 Q.B. 498 (C.A.)] to that portion of the land from which the lessee was dispossessed. Further, however, that this interest so acquired was subject to being defeated by an agreement between lessor and lessee; namely a surrender of the leasehold term as against the lessor. This surrender was held to entitle the lessor to immediate possession and to the right to evict the squatter. Before the surrender the lessor was held to be in the position of the reversioner, or remainderman [not entitled to possession - see Secs. 5 and 6 of the Limitation Act Ont.]. However, on the surrender the lessor was found to become immediately vested with title to possession, and thus entitled to evict the squatter. The only impediment [or defence available to the squatter] to the lessor's action for possession as against the squatter was the term of years prior to the fee simple in reversion or remainder, which as against the lessor was held by the lessee [an example of the plea of jus tertii]. Once this interest was surrendered by the lessee, the lessor accordingly had an immediate right to possession.

At least two factors seem to have influenced the House of Lords in arriving at this condlusion. Had the leasehold estate been held extinguished for all purposes, it would have followed that the lessor's fee simple in reversion would in 1932 [the date adverse possession against the lessee was completed] have become vested in possession. The limitation Act would then have begun to run against the lessor and in 1944 his title would have been extinguished. Lord Denning stated that in 99 cases out of 100, the freeholder has no knowledge of the fact of adverse possession and that it would be utterly wrong if the title of the freeholder could be eroded away during the lease without his knowledge". Secondly by maintaing the existence of the lessee's estate as against the lessor, privity of estate was maintained and the lessee therefore remained liable on the covenants. Otherwise the lessor would have been deprived of the right to enforce such covenants [in relation to the squatter's portion of the land] for it was held that the squatter did not by his possession acquire the lessee's term, or his rights or obligations as against the lessor. The squatter was entitled to possession as against the lessee [and before the surrender as against the lessor], and he was in no way a transferee or holder of the lessee's term of years, nor was his estate in any sense "commensurate" with that of the one dispossessed.

The interest [estate, title] acquired by a squatter does not as a result of the Fairweather Case, appear to have suffered any change, save that if acquired by possession against a lessee, it is subject to being defeated. As a result, in the case of adverse possession against a lessee the lessee [as to the ability to surrender] appears to be in no different a position before than after the limitation period, for in either case the squatter's title is subject to being defeated by the lessor and lessee arranging a surrender. Just as titles may be relative, so also may the extinguishment of titles. The dispossession by a squatter extinguishes only the right and title of the dispossessed as against the dispossessor. Therefore, where dispossession is against a lessee, the lessee's estate is not extinguished for all purposes, as against the lessor it still subsists. So much so that if the squatter goes out of possession [abandons the land] the lessee, not the lessor has the immediate right to possession the surrender was held to effect a determination of the leasehold estate held by the lessee [rather than an assignment of it]. Therefore, the lessor did not take through his lessee but by virtue of his ownership of the fee simple. This is to be contrasted with the protection afforded a sub-lessee on a lessee's surrender of the head lease. This protection is based on the fact that the sub-lessee takes through the lessee and as a result the lessee cannot by his surrender, derogate from his grant. In this situation only, and for the purposes of the sub-lease alone, does a surrender operate as an assignment to the lessor of the lessee's term. However, a squatter takes in spite of and not through the lessee, and is in fact a trespasser.

See Wade, Landlord, Tenant, Squatter 78 L.Q.R. 541. Also see Higgins (1962), Camb. L.J. 31; Valentine (1962), 25 M.L.R. 249, also see Wade 78 L.Q.R. 33.

See too, Tickner v. Bizzacott [1965] Ch. 426.

Parties may in succession gain possession of land adversely to the paper title holder.

NOTE: (i) If privity exists between the successive occupants it is clear that the statute operates and that accordingly the right of the paper title holder is barred and his title is extinguished.

For example:
In 1939 X dispossessed Y. In 1946 X sold the land to Z.
At what date would Y's title have been extinguished?
See Beaudoin v. Brown (1961), 28 D.L.R.(2d) 16; also see Robinson v. Osborne (1912), 8 D.L.R. 1014 (conveyance, but gap in possession); see McGibbon v. McGibbon, [1913], 9 D.L.R. 308 (N.S.C.A.) [devise]

(ii) Early cases raise the issue whether privity was necessary for this result to follow. See McConaghy v. Denmark (1880), 4 S.C.R. 609; Ryerse v. Teeter (1878), 44 U.C.Q.B. 8 (C.A.); Simmon v. Shipman (1888), 15 O.R. 301; Farren v. Pejepscot Paper Co., [1933] S.C.R. 388, [1933] 4 D.L.R. 92. See also annotation by Armour (1912), 8 D.L.R. 1021.

(iii) The present position appears to be that privity is not necessary.

For example:
In 1950 X dispossessed Y. In 1955 Z dispossessed X.
At what date would Y's title be extinguished?
See Willis v. Howe, [1893] 2 Ch. 545; Handley v. Archibald (1900), 30 S.C.R. 130, 137; Babbitt v. Clarke, [1925] 3 D.L.R. 55; Robinson v. Tucker, [1954] 2 D.L.R. 763; Fleet and Fleet v. Silverstein (1963), 36 D.L.R. (2d) 305.

(iv) It is essential that there should be no gap between the possession of the successive occupants.

For example:
In 1950 X dispossessed Y. In 1951 X vacated the land.
In 1957 Z took possession.
At what date would Y's title be extinguished?
See the Trustee Agency Co. v. Short (1888), 13 App. Cas 793; Handley v. Archibald (1900), 30 S.C.R. 130; Robinson v. Osborne (1912), 8 D.L.R. 1014.

(v) What is the meaning of "privity" in this context? In the American case of Illinois Steel v. Poczacka, 139 Wis. 23, 119 N.W. 550, (1909), the court stated that:

> "It is said that there must be privity between successive occupants but this does not at all mean that there must be privity of title. The privity between successive occupants required for the Statute of Limitations is privity merely of that physical possession and is not dependent upon any claim, or attempted transfer, or any other interest or title in land."

See an article by H. Ballantine in 32 Harv. Law Rev. 135.

(vi) What is the position as between successive adverse occupants.

For example:
In 1955 X dispossessed Y. In 1963 Z dispossessed X.
Who is now entitled to possession of the land? What would be the result of an action for possession between Y and Z; also between X and Z? Assume that in 1964 X dispossessed Z. Would Z succeed in an action for possession? What if in 1964, B, a stranger, evicted Z?
See Cosbey v. Detlor (1911), 20 O.W.N. 668 (C.A.); Robertson v. Tucker (1954), 2 D.L.R. 736; also see C. v. B. (1938), 1 Res. Judicatae 302.

NOTE: In Gay v. Wierzbicki, Laskin, J.A. classified the facts as raising a problem of a "mistake of title" as opposed to "mistake of identity" and so assumed, with the parties and the trial judge, that section 38 (1) of the Act clearly was applicable. What is a "mistake of identity"? If a mistake of identity is different from a mistake of title, should section 38 (1) be restricted to situations involving the latter? In any event is the distinction meaningful?

In considering these questions, a brief historical excursion may be of assistance. The root of the present section 38 (1) is found in "An Act for the protection of persons improving Land under a Mistake of Title" S.O. 1873, c.24,s.1, the basis of which is discussed in Beaty v. Shaw (1887) 14 O.A.R. 600.

In 1887, the 1873 legislation, as amended, was enacted as section 30 of The Law and Transfer of Property Act, R.S.O. 1887, c.100, which is substantially the same as section 38 (1) of the present Act.

Along with section 30 under the heading "Improvements Under Mistake of Title", in the 1887 Act, was section 31 which provided, in part, as follows:

> In case an action for the recovery of land is brought against a person who, after any line or limit has been established according to The Act respecting Surveyors and the Survey of Lands, is found, in consequence of unskilful survey, to have improved on lands not his own, the Judge before whom the action is tried shall assess or direct the jury to assess damages for the defendant for any loss he may sustain in consequence of any improvement made before the commencement of the action, and also assess or direct the jury to assess the value of the land to be recovered...

By its own terms section 31 of the 1887 Act was restricted to cases of "unskilful survey". It was enacted initially in 1818 (see 59 Geo.III c.14,s.12) and appeared as section 59 of The Survey of Lands Act, C.S.U.C. 1859, c.93. In the 1877 revision of the statutes, the section was enacted as section 29 of the Ejectment Act R.S.O. 1877, c.51 and appeared under the heading, "damages to defendant for improvements made on land not his own in consequence of unskilful survey". In 1887, it became section 31 of the Land and Transfer of Property Act. It was repealed by The Conveyancing and Law of Property Act, S.O. 1911, c.25, s.53.

In light of this survey, is the conclusion justified that section 38 (1) of the present Act applies only to the mistake of title situations? The question has not been finally resolved in any reported case in Ontario.

In Manitoba, Williams C.J.Q.B. restricted the scope of the Manitoba equivalent of section 38 (1) to the mistake of title situation. In addition to the equivalent of section 38 (1), however, the Manitoba legislation contained a separate provision analogous to the pre-1911 Ontario unskilful survey section. (See Mohl v. Senft (1957) 6 D.L.R. 2d 32.)

On the other hand, in Saskatchewan, Martin J.A. in Schull v. Morrison [1930] 4 D.L.R. 564 concluded that both mistake of title and mistake of identity were embraced by the Saskatchewan equivalent of section 38 (1). It should be noted that Saskatchewan had not enacted a provision analogous to the pre-1911 Ontario unskilful survey legislation.